

competitors looking to invalidate a patent that threatens their industry.

Like tiered review, “post-grant opposition is attractive because it harnesses private information; this time, information in the hands of competitors.” Armed with this information, the PTO can better “identify patents that warrant serious review, and it also makes that review less expensive by creating a mechanism by which competitors can share critical information directly with the Patent Office.” A post-grant opposition system is part of proposed patent reform legislation.

The success of post-grant opposition depends on the willingness of third parties with good information about the validity of a patent to challenge that patent in a public forum rather than settling privately. Some commentators are skeptical, pointing out that invalidating patents is a public good that the challenger would share with every other competitor.

Patent law already has mechanisms that could be used to achieve the same goal. Some issued patents are returned to the PTO after issuance and are reevaluated through an adversarial process known as *inter partes*

reexamination. This is an evaluation to which some deference is appropriate, though today the law gives complete deference to that determination. Even traditional *ex parte* reexamination, while not truly adversarial, allows the filer to submit an initial explanation of the reasons for reexamination, and the result has been that in recent years patents fare worse in reexamination than applications do in initial examination.

The biggest risk with post-grant opposition and related systems is that we give challengers too many bites at the apple, allowing them to inundate patentees with an endless set of challenges. To solve that problem, it is appropriate to place some limits on the number and perhaps the timing of challenges, and to imbue patents that survive those challenges with a strong presumption of validity.

Can the patent office be fixed? Well, maybe. Certainly it can be improved, and the current administration is taking innovative strides in that direction. But there may be systemic reasons to think that the PTO will never be all that we might hope. ■

Oldfather and Peppers

Till Death Do Us Part: Chief Justices and the United States Supreme Court

This is an excerpt from an essay forthcoming in the *Marquette Law Review*. The excerpt picks up after the authors’ account of Chief Justice William H. Rehnquist’s death in office and concludes before their focus on the administrative role of the Chief Justice of the United States, which is unique among members of the Supreme Court, and their proposals for reform. Todd C. Peppers is the Henry H. and Trudye H. Fowler Professor of Public Affairs at Roanoke College and currently a visiting Professor of Law at Washington & Lee University School of Law. Chad M. Oldfather is Professor of Law at Marquette University.

The final illness of Chief Justice Rehnquist, and his decision not to retire in the face of a terminal illness, are undoubtedly a poignant story of an individual who gave his last full measure to an institution that he loved. There is, however, another dimension. Placed into historical context, the episode illuminates an additional troubling aspect of lifetime tenure, namely, the lack of institutional norms regarding when chief justices should release the reins of power.

Article III, Section 1 of the United States Constitution states that all federal judges “shall hold their offices

during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.” In short, judges can only be removed from office by impeachment. Such judicial independence is necessary, explains Alexander Hamilton in Federalist No. 78, if federal judges are to fulfill the critical role of protecting the Constitution from overreaching by the other branches of government and to protect minority rights from the momentary whims of the majority. It has proven to be an effective shield. Since the ratification of the Constitution, only one

Supreme Court justice has been impeached. Associate Justice Samuel Chase was impeached by the House of Representatives in March of 1804, but was acquitted by the United States Senate. While House Republicans threatened to hold impeachment hearings regarding Associate Justice William O. Douglas (mainly due to the Justice's messy personal life), no hearings ever materialized.

Historically, the primary danger associated with the substantial independence of the federal judiciary resulting from life tenure is a lack of accountability. Reduced to its essence, the strong form of this argument runs that the independence engendered by lifetime tenure in turn empowers federal courts to substitute their own policy preferences for those of duly elected legislators.

Yet, as developed in the debates referred to above, lifetime tenure also raises concerns about the competence and ability of aging jurists. Indeed, the history of the United States Supreme Court is filled with examples of justices who remained on the bench as their physical health deteriorated and their mental acuity declined. These concerns about judicial competency should be greater when it comes to chief justices. The chief justice bears a host of responsibilities beyond those of an associate justice, which increases the potential consequences of an inability to serve. What is more, when compared to associate justices, chief justices show even a greater reluctance to leave the Supreme Court.

Political scientist David N. Atkinson has documented Supreme Court justices "at the end," and his accounts offer an important warning that lifetime tenure comes with the additional cost of judicial infirmity. Moreover, a close examination of the history suggests that the dangers of infirmity are more likely to arise with respect to chief justices. According to Atkinson's research, only four of the last sixteen chief justices have retired from the Supreme Court while in good health: John Jay (chief justice from 1789 to 1795), Charles Evans Hughes (1930 to 1941), Earl Warren (1953 to 1969), and Warren Burger (1969 to 1986). Historically, the norm has been for the chief justice to die on the bench. John Marshall (1801



John Jay (1745-1829), first Chief Justice of the United States. Engraving by Hall, undated.

to 1835), Roger Taney (1836 to 1864), Salmon Chase (1864 to 1873), Morrison Waite (1874 to 1888), Melville Fuller (1888 to 1910), Edward Douglass White (1910 to 1921), Harlan Fiske Stone (1930 to 1941), and Fred Vinson (1946 to 1953) all died while still holding the position of chief justice, while William Howard Taft (1921 to 1930), who was battling multiple health problems, resigned shortly before his death and Oliver Ellsworth left the bench while facing a chronic health condition. While the second chief justice of the Supreme Court, John Rutledge (1795), was only a recess appointment, there is evidence to suggest that the

Senate voted against confirming him based on concerns about his sanity.

Of the chief justices who died while on the bench, only the deaths of Harlan Fiske Stone and Fred Vinson were sudden and unexpected. The remaining chief justices suffered from significant health problems over a sustained period of time, and their physical decline was known to court insiders. Oliver Ellsworth submitted his resignation to President Thomas Jefferson after developing a painful kidney disorder. The last three years of John Marshall's life saw the legendary Chief Justice battle what was likely liver cancer. Shortly before he died, friends described the 79-year-old Marshall as "very emaciated, feeble, & dangerously low" but alert and clear-headed. Two years before his death, a sickly Roger Taney had a "premonition of death" and said goodbye to his fellow justices. Still alive one year later, Roger Taney told a friend that he "hope[d] to linger along to the next term of the Supreme Court." Linger he did, remaining on the Court until his death on October 12, 1864, at the age of 88. A stroke rendered Chief Justice Salmon P. Chase "barely able to function" during October Terms 1871 and 1872, but a colleague noted that Chase's daughters—including the politically ambitious Kate Sprague—"will never consent to his retiring to private life." In a letter written shortly after October Term 1872, Chase wrote that "I am too much of an invalid to be more than a cipher. Sometimes I feel as if I were dead, though alive." Chase, who had once served as Abraham Lincoln's



treasury secretary and whose transparent political ambition resulted in his banishment to the Supreme Court, died two days later at the age of 65.

A nervous breakdown in 1885 started a downward spiral for Chief Justice Morrison Waite, and during one of his last appearances on the bench Attorney General Alexander Garland observed that “it was evident to the observer death had almost placed its hand upon him.” Chief Justice Melville Weston Fuller remained in fairly good health until October Term 1909, when the diminutive jurist’s own declining health and the illness of other justices made it difficult for him to carry out his duties. After Fuller’s death by heart attack on July 4, 1910, Justice Oliver Wendell Holmes wrote that the 77-year-old “Chief died at just the right moment, for during the last term he had begun to show his age in his administrative work.”

Less than a week after the Court ended October Term 1921, an obese, 76-year-old Edward Douglas White died after undergoing gallbladder surgery—thus enabling William Howard Taft to fulfill his dream of becoming the next chief justice. While Taft had lamented the fact that the aging and infirm White would never vacate the center chair, eight years later Taft would be bemoaning his own physical decay. Describing himself as “older and slower and less acute and more confused,” Taft wrote to his brother that he “must stay on the court in order to prevent the Bolsheviki from getting control.” Plagued with cardiac disease, high blood pressure, insomnia, and anxiety during the last year of his life, William Howard Taft reluctantly resigned his position on February 3, 1930—only to die approximately one month later. While his successor, Charles Evans Hughes, would leave the Court in good health, Hughes’s successor, Harlan Fiske Stone, suffered a fatal cerebral hemorrhage while reading an opinion from the Supreme Court bench. The man selected to replace Stone, Fred Vinson, died of a sudden heart attack at the age of 63.

As noted above, the clear historical pattern of dying while holding the center chair was broken by Earl War-

ren and Warren Burger, who both left the Court while in good health. Ironically, it would be an avid student of Supreme Court history, William Rehnquist, who would reestablish the controversial tradition of chief justices holding onto power after illness had clearly rendered them unable to perform their duties.

When it comes to the associate justices, a slightly different pattern emerges, and it suggests that they are less likely to continue to serve despite faltering abilities. In the 19th century, the majority of associate justices died in office. But the numbers change dramatically in the 20th century, during which only four associate justices died on the bench while battling significant physical or mental infirmity (Rufus W. Peckham, Joseph R. Lamar, Benjamin Cardozo, and Robert H. Jackson). In contrast, a relatively large number of associate justices were forced from the bench due to illness or cognitive decline, including Horace Gray, Henry Billings Brown, William Moody, William



Portrait of U.S. Supreme Court Chief Justice Morrison Remick Waite (1816-1888). Photograph ca 1875.

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R. Day, Mahlon Pitney, Joseph McKenna, Oliver Wendell Holmes, Jr., Sherman Minton, Harold Burton, Charles Whittaker, Felix Frankfurter, Hugo Black, John Marshall Harlan II, William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall. In addition, and in further contrast to the chief justices, a substantial number of associate justices have left the bench while in relatively good health. In the 20th century, these justices include George Shiras, John H. Clarke, Willis Van Devanter, George Sutherland, Louis Brandeis, James C. McReynolds, Owen J. Roberts, James Byrnes, Stanley Reed, Arthur Goldberg, Tom Clark, Abe Fortas, Potter Stewart, Lewis Powell, Byron White, and Harry Blackmun. We can now add Sandra Day O’Connor and David Souter. All in all, fewer than 30 percent of the associate justices who have served in the 20th century have died in office.

Although the numbers involved are too small to permit certain conclusions, the patterns nonetheless invite consideration of whether chief justices are more likely to die in office than associate justices, and what factors might lead to such a differential. Of course, the decision

to leave the court is complex. Atkinson suggests that there are a host of reasons why the justices hang on to the bitter end:

Supreme Court justices do not voluntarily leave office for the following reasons: (1) financial considerations; (2) party or ideology; (3) a determination to stay; (4) a sense of indispensability; (5) loss of status; (6) a belief that they can still do the work; (7) not knowing what else to do; and (8) family pressure to stay in office.

Political scientist Artemus Ward believes that politics primarily explains the retirement choices of modern Supreme Court justices. Ward writes that while justices' retirement decisions were once "primarily concerned with institutional and personal factors" (including how to survive without a judicial pension, which would explain why so many associate justices died in office in the 19th century), "generous retirement benefits coupled with a decreasing workload have reduced the departure process to partisan maneuvering."

This does not explain, however, the tendency for more chief justices to die in office (or remain until illness forces their hand) than retire. The answer may lie in the unique role and powers of the chief justice. As

we explore below, the chief-justice role has evolved to encompass a much greater range of responsibilities than possessed by the associate justices, which may add to the allure of the job to such an extent that its holders are more reluctant to leave. But it may be another aspect of the chief-justice role that is primarily responsible for the seeming differential in the likelihood that justices will serve beyond their ability to do so effectively. At various points in history, it

has been the chief justice—often with the consensus of the Court—who has approached ailing justices and suggested retirement. "The chief justices have traditionally borne the principal burden of dealing with incapacitated colleagues, which has all too frequently proved to be trying," observes Atkinson. "They have been least successful when a justice is reluctant to leave or determined to stay. Although the chief justice is *primus inter pares*, or first among equals, his principal power is that of persuasion."

Atkinson provides three examples of the chief justice's power of persuasion at work. He writes that Chief Justice William Howard Taft felt "great consternation" about Justice Joseph McKenna's dwindling mental acuity, and that the poor quality of Justice McKenna's work product forced Taft to approach McKenna's family (and eventually McKenna himself) in hopes of persuading him to resign. The Chief Justice, however, did not rely upon tact alone in pushing McKenna off the Court. The justices themselves had secretly decided to not decide any cases in which McKenna was the deciding vote. Chief Justice Charles Evans Hughes paid a similar visit to a 90-year-old Oliver Wendell Holmes, Jr., but Holmes—unlike McKenna—graciously accepted the gentle nudge. Approximately 50 years later, Chief Justice Warren Burger followed Taft's lead and used a similar tactic, when he convinced the other justices (save a protesting Byron White) to allow him to schedule for reargument cases in which ailing and confused Justice Douglas cast the deciding vote. Similar steps were taken to guarantee that Douglas would not determine on which cases the Court would grant cert.

Consider now Chief Justice Rehnquist's decision to remain in office. The standard explanations do not apply. Clearly, partisan considerations cannot account for his decision; President George W. Bush had just been reelected to office, and the Chief Justice had several years in which to retire from the Supreme Court with the assurance that a Republican president would pick his successor. Given the Chief Justice's length of service, he could have retired at full salary—so monetary considerations cannot explain his behavior. Moreover, Herman J. Obermayer's description of his late friend's love for the Court, and his loneliness at the death of his wife, suggests that Rehnquist enjoyed his status as chief justice and did not relish the notion of retirement. Finally, the Chief Justice's own press releases demonstrate that he felt that he was still capable of performing his duties.

Yet Atkinson's comments about the role of the chief justices in pushing colleagues to retire suggest another



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U.S. Supreme Court Chief Justice William H. Rehnquist, June 2005.



answer—there are no norms or historical precedent dictating that associates justices can, or should, approach a disabled chief justice and urge him to resign. Granted, the fact that Chief Justice Rehnquist’s own colleagues did not know the extent of his illness meant that they did not have the relevant information necessary to make such an overture. Even if they had, however, they faced several hurdles in doing so. Because none of them had a formal administrative role, they faced a coordination problem in deciding to act, especially if they did not all agree that action was warranted. Moreover, even if the associate justices were willing to discuss the chief justice’s disability with him, they lack the institutional levers to give the chief justice a necessary push. Unlike Chief Justices Taft and Burger, the associate justices cannot schedule cases for reargument or suspend the “rule of four” in order to divest an ailing chief justice of his vote. Without such institutional norms and powers, the associate justices do not have the wherewithal to make a chief justice candidly and objectively assess his own disability.

For all this, one might still ask whether judicial disability is that pressing of a concern. To be sure, as Atkinson aptly demonstrates, history is filled with examples of disabled justices. David Garrow has argued that the

problem of “mental decrepitude” occurred more frequently during the 20th century than the 19th and that it remains “a persistently recurring problem that merits serious attention.” Yet, as Ward Farnsworth has observed, the periods of time in the 20th century during which justices worked while suffering from some degree of mental deterioration constituted at most two percent of the aggregate service time of all the justices during that century. Farnsworth further contends that the effects of disability are mitigated by the presence of the other justices, as well as by the presence of a justice’s law clerks, “who generally can keep a chambers running without a drop-off in quality remotely commensurate with the justice’s drop-off in functionality.”

We are inclined to side with those who view mental and physical deterioration among the justices as a matter of concern. Even were we to accept the arguments of those who maintain that the problem is not significant, however, we believe that the chief justice presents a different case. The reason why we should be concerned about the variation in retirement rates between the associate and chief justices, and about the corresponding increase in the likelihood that a chief justice will continue to serve while disabled, has to do with the unique powers of the center chair. . . . ■

Remarks of Dean Kearney

Investiture of the Hon. James A. Wynn, Jr.

On April 12, 2011, there was a formal investiture, in Raleigh, N.C., of the Hon. James A. Wynn, Jr., as a judge of the United States Court of Appeals for the Fourth Circuit. Judge Wynn, L’79, previously served as a judge of the North Carolina Court of Appeals and on the North Carolina Supreme Court. The following are the remarks of Dean Joseph D. Kearney before the Fourth Circuit en banc and a large assemblage of other judges, members of the bar and community, and Judge Wynn’s family and friends.

Thank you, Chief Judge Traxler, and May It Please the Court. I am qualified to bring but *thanks* and *greetings* to this event. For, while I have been dean of Marquette University Law School for going-on eight years, I can claim no credit for Judge Wynn’s accomplishments. I was a barely tenured faculty member when I first met him at Marquette. He and I had a public discussion then concerning the best modes of judicial selection: I was young, but wise enough not to make it a

debate. My poor powers of oratory are no match for Judge Wynn’s. In all events, the thanks are to Judge Wynn, not simply for the invitation to speak today but for always remembering us at Marquette, in active ways, whether



Hon. James A. Wynn, Jr.